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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-1471

WILLIAM HOZIE

and

CLELIA HOZIE

Petitioners,

v.

KAREN HOZIE

Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the
State of Virginia

WILLIAM HOZIE
CLELIA HOZIE
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Fort Collins, CO 80522

Petitioners

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The petitioners, WILLIAM HOZIE and CLELIA HOZIE, respectfully pray that a writ of certiorari issue to reverse the decision of the Supreme Court of the State of Virginia numbered 770411 therein.

OPINION BELOW

The decision of the Supreme Court of the State of Virginia is attached as Appendix A to this petition. On April 29, 1977, the Supreme Court of the State of Virginia upheld the decision of the Circuit Court of the City of Charlottesville, Virginia. Said order was made without any opinion.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of Virginia acted in an arbitrary and capricious manner in rendering a decision with no reasonable justification that unlawfully violates sections of the existing Virginia Code, and by its actions deprived the petitioners of their right to trial and deprived them of property without due process, contrary to the United States Constitution, Amendments VII and XIV, Section 1, respectively.

2. Relative to United States Constitutional Amendments VII and XIV, Section 1: Whether an award made by a lower court in the State of Virginia and upheld by the Supreme Court of the State of Virginia thereby affirming an alleged contract of settlement based on the

testimony of two opposing counsel whose authority and method of settlement runs contrary to the Virginia State Code, can be allowed.

3. Whether a trial court judge in the Circuit Court of the City of Charlottesville, Virginia acted in an arbitrary and capricious manner in overruling petitioners' motion to set aside the verdict and grant a new trial and made this decision with no reasonable justification, knowing full well that both counsels' previous actions were unlawful and run contrary to Virginia State Code which deprives petitioners their rights under the Virginia State Code and the United States Constitution, Amendment VII and XIV, Section 1, can be allowed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII, provides in part:

> "In suits at common law the right of trial shall be preserved."

United States Constitution, Amendment XIV, Section 1, provides in part:

> "No state shall deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

Virginia Code §8-503

"Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court or by the consent of the parties given in court in person, or by counsel, it shall be entered in the proceedings of such court; and thereupon a rule shall be made that the parties shall submit to the award which shall be made in pursuance of such agreement."

Virginia Code §8-506

"No such award shall be set aside except for errors apparent on its face, unless it appears to have been procured by corruption or other undue means or that there was partiality or misbehavior in the arbitrators."

REASONS FOR GRANTING WRIT

United States Constitutional guarantees under law must be preserved and guarded diligently by the federal judicial system in relation to the fifty states.

When a state whose attorneys and courts, at all levels, unlawfully violates its own laws and Code and therefore denies citizens of their constitutional guarantees, it becomes imperative that the Supreme Court of the United States intervene to protect these guarantees by creating an opportunity for the one state to re-evaluate its legal obligations to the citizen and at the same time cause the fifty states to become more aware of the inherent danger of taking law for granted as courts become increasingly more complex and crowded.

STATEMENT OF THE CASE

On August 27, 1976, Karen Sue Hozie filed a Motion for Judgment against William Hozie and Clelia Hozie in the Circuit Court of the City of Charlottesville, Virginia seeking money damages for an alleged breach of a contract to settle certain lawsuits and other controversies then pending between respondent and petitioners. Respondent requested a jury trial and was not present. Respondent's counsel relied entirely on the uncertain memory and contradictory testimony of Mr. William Preston, the petitioners' former counsel. No power of attorney or written authorization from either petitioner had ever been obtained by Mr. Preston.

Mr. Preston, from memory only, testified he had authority to settle all matters for any reasonable amount, particularly close to between $20,000 and $15,000 (T.41). Mr. Preston then testified he was authorized to put $37,000 in an escrow account to permit the closing of a property on which the respondent had placed a lis pendens ten months early in an anticipation of an alleged breach of contract (T.43).

Mr. Preston, on cross-examination then admitted that specifically on November 3, 1976, only fifteen days before his trial testimony, in a deposition that petitioners

had given him verbal cash settlement authority of $57,774.04 (T.59). Mr. Preston could offer no explanation for this dramatic change in his testimony. (T.60). Mr. Preston admitted his deposition testimony was in error but did not know what corrected his memory in his testimony in court (T.60-61).

Mr. Matthew Murray, the respondent's counsel, told a very different story on direct examination. While Mr. Preston, the petitioners' counsel, stated he had unlimited blanket authority to settle, Mr. Murray, the respondent's counsel, stated that upon agreement of the terms of settlement, Mr. Preston told Mr. Murray, "Well, I'll take it to my client." (T.15). Several hours later that afternoon, Mr. Preston called Mr. Murray and stated, "We have a deal." (T.15,23). However, Mr. Preston testified he didn't even know where his clients were on August 4, 1976, the day of counsels' alleged settlement, and did not hear from them until "somewhere between seven and seven-thirty" that evening (T.45). Mr. Murray was quite certain that when Mr. Preston left his office that day, they had not reached a final settlement which was binding on their respective clients. (T.29-30).

In spite of the totally contradictory and confused testimony of both counsel

and the lack of any written evidence of settlement authority, save one letter written to Mr. Preston by petitioners summarizing their understanding of the situation, which was not allowed into evidence because the respondent claimed it might sway the jury with the trial court agreeing, the jury made its decision contrary to the evidence presented in favor of the absent respondent.

ARGUMENT

1. UNLAWFUL VIOLATION OF THE VIRGINIA STATE CODE BY TRIAL AND APPEALS COURTS IN RENDERING A DECISION IS WITHOUT PRECEDENT AND REQUIRES CONSTITUTIONAL SAFEGUARDS

This writer has not been able to find one case in which a court was allowed to make its decision in direct violation of state law and this fact certainly becomes subject to the constitutional safeguards of due process.

It has been stated in the testimony given by Mr. Preston, petitioners' counsel, who was uncertain as to his authority to settle all claims, that he had no written authority to conclude any settlement on petitioners' behalf without their express written agreement.

A settlement is defined in part as "meaning to agree, to approve, to arrange to ascertain, to determine, to free from uncertainty, to place or to regulate." ***Edwards v. Edwards,*** Tex. Civ. App., 52 S.W.2d 657, 661; ***Kocher v. Ricketts,*** 71 Ohio App. 8, 47 N.E.2d 657, 659. "Parties to a settlement are said to settle an account when they go over its items and agree upon the balance due from one another." ***M. Zimmerman Co. v. Goldberg,*** 69 Pa. Super. Ct. 254, 255; ***State Bank of Stratford v. Young,*** 1959 Iowa 375, 140 N.W. 376, 380.

While both counsel testified they had permission to negotiate, Mr. Preston, admittedly, was not a party to the settlement, but an arbitrator on the petitioners' behalf. Mr. Murray, respondent's counsel, in his testimony, stated that Mr. Preston "had to clear the verbal settlement offer with his clients" (T.15). This testimony by opposing counsel clearly establishes Mr. Preston's authority as that of an arbitrator with no authority to finalize any settlement. Mr. Murray further stated that in the early afternoon of August 4, 1976, Mr. Preston called him to say "We have a deal." (T.15,23).

In direct opposition to both the above opposing counsels' testimony, Mr. Preston was later to state he "didn't even know where his clients were on August 4, 1976"

(T.45) the day of the alleged settlement. (Petitioners were enroute to a new residence located in Colorado). In addition, Mr. Preston admitted the only time he heard from his clients, your petitioners, during August 4, 1976, was "somehwere between seven and seven-thirty that evening." (T.45), after the settlement had been "finalized".

The first indication that an alleged settlement had been reached was communicated to Clelia Hozie in a brief, hurried telephone conversation which interrupted Mr. Preston's evening meal on August 4, 1976 (T.136-137). Mr. Preston confirmed that he did not convey the settlement details during that conversation. (T.46).

All attempts to contact Mr. Preston were futile once the unauthorized settlement terms were made aware to the petitioners, until he either returned from his vacation two weeks later, or the petitioners received Mr. Murray's papers (T.141-143) outlining the settlement terms.

The entire above mentioned confusion, misunderstandings and self-contradicting testimony are clearly in violation of Virginia Code §8-506, ***supra***, which states in part that "an award shall be set aside if procured by undue means, partiality or ***misbehavior*** of the arbitrators. (Emphasis supplied)

Further, in ***Pleasants v. Ross***, 1 Wash. (1 Va.) 156, the Virginia Supreme Court declared that "unless arbitrators certify principles on which they decide, the Court will set aside the award if they appear to have acted under a mistake." Mr. Preston's testimony constitutes a mistake and misbehavior in his confused statements by contradicting himself consistently in testifying that he could:

(1) settle for between $20,000 and $15,000 (T.41);
(2) could put $37,000 into an escrow account (T.43);
(3) had verbal authority to settle for $57,774.04 (T.59);
(4) had to contact his clients to finalize settlement (T.15);
(5) said he had a deal (T.15-23); and
(6) he didn't have contact with petitioners until after hours on the alleged settlement day (T.15).

By the above testimony of counsel there was a violation of Virginia State Code §8-503, ***supra***, which in part states that "submission may be completed only by consent of the parties given in court in person" and the petitioners denied any consent whatsoever was ever given to counsel to finalize settlement without their written consent. (T.91-93, 115, 116-117, 130-131). The above testimony of counsel also violates Virginia State

Code §8-506, supra , which states "A court will set aside an award if it appears to have been procured by corruption, undue means, partiality or ***misbehavior***". (Emphasis supplied). It was the duty of the trial court to overturn the verdict based on Virginia Code which was denied and the trial court further erred in not allowing a new trial based on the consistent contradictory testimony of both counsel going contrary to Virginia law. It was the duty of the Virginia State Supreme Court to recognize the easily discernable state of confusion that existed among counsel and the contradictions that abound in their testimony and their lack of proof in any form whatsoever that any authority to settle ever existed. These facts taken into consideration under Virginia law could only have resulted in the overturn of the lower court's decision based on the Virginia Code, §8-503 and §8-506, and protect the rights of the petitioners in this matter.

The Virginia court's further improprieties are represented in ***Dawson v. Hotchkiss,*** 760 Va. 577, 169 S.E. 564 (1933) in which case the Virginia Supreme Court stated, "that an attorney has no power to compromise or settle his clients claims in the absence of express authority of his clients". Then in ***Wheatly v. Martin,*** 6 Leigh (33 Va.) 62; ***Moore v.***

Luckless, 23 Gratt (64 Va.) 160; ***McKennie v. Charlottesville,*** R.Co. 110 Va. 70, 65 S.E. 503, there have been additional grounds established for setting aside a ruling on which neither Virginia court relied. In sum, it is stated that "equally in law or equity reasons for setting aside must appear on its face ***or there must be misbehavior in the arbitrators or some palpable mistake.*** (Emphasis supplied).

Further, in ***Pollack v. Sutherlin,*** 25 Gratt (66 Va.) 78, there is stated "any award which does not conform to the submission is of no effect unless the parties have confirmed it." Therefore, by Virginia statute and case law published there was absolutely no reasonable justification for the arbitrary and capricious manner in which the decisions rendered by the Virginia courts were reached.

II. THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE, VIRGINIA AND THE SUPREME COURT OF THE STATE OF VIRGINIA OVERLOOKED THE VIRGINIA SUPREME COURT DECISION RELATING TO EVIDENCE.

Every participant in the Circuit Court except the petitioners were licensed

attorneys and the trial court was sensitive only to the uniform professionalism of the attorneys present. All counsel were allowed to read their notes, others notes and confer with each other. The petitioners were rigidly kept to mental recall only and the one piece of evidence for the petitioners was not allowed because, according to respondent's counsel, it would sway the jury. The Virginia Supreme Court also overruled the introduction of this piece of evidence without comment, thereby confirming the attorneys' professional trial and denying petitioners their rights guaranteed under both Virginia Code and federal law. In relation to this point of law, the Virginia Supreme Court further contradicted itself when it overlooked its own decision which states that "admissibility of evidence is a state problem and raises a federal constitutional question only in circumstances which operate to deny petitioners a fair trial." ***Asbury v. Oliver,*** D.C. Va. 1970, 318 F.Supp. 44.

The Virginia State Supreme Court's ruling contradicts itself and by this court's own decision causes the petitioners to fall under the providence of the Supreme Court of the United States. The petitioners pray this court reverse the Virginia court's contradictory decision and cause that court to rely specifically on its own state laws and its own decisions. Because of their

unlawful, contraditions of law, the Virginia Supreme Court has caused "a federal constitutional question to be raised which operates to deny the petitioners a fair trial." ***Asbury v. Oliver,*** D.C. Va. 1970 318 F. Supp. 44.

Thus your Petitioners respectfully submit that a writ of certiorari be granted.

Dated, Fort Collins, Colorado, July , 1977.

Respectfully submitted,

William C. Hozie

Clelia A. Hozie

Box 1217
Fort Collins
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Petitioners.

APPENDIX

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 29th *day of* April, 1977.

The petition of William C. Hozie and Clelia A. Hozie for a writ of error to a judgment rendered by the Circuit Court of the City of Charlottesville on the 7th day of December, 1976, in a certain motion for judgment then therein depending, wherein Karen S. Hozie was plaintiff and the petitioners were defendants, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition, and refuse said writ of error, the effect of which

is to affirm the judgment of the said circuit court.

Record No. 770411

A Copy,

Teste:

Howard G. Turner, Clerk

By: Richard R. Bouch
Deputy Clerk